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COURT OF APPEALS, STATE OF NEW YORK

IN THE MATTER OF THE APPLICATION FOR ORDER IN PURSUANCE OF THE PROVISIONS OF ARTICLE 78 OF THE CIVIL PRACTICE ACT, IN FAVOR OF CARMINE PIZZA,

Petitioner-Appellant,

vs.

JOHN A. LYONS, AS A NEW YORK STATE COMMISSIONER OF CORRECTIONS; THE NEW YORK STATE BOARD OF PAROLE CONSISTING OF FREDERICK A. MORAN, CHAIRMAN; LOUIS F. COSTUMA, REGINALD B. TAYLOR, DONALD H. GRANT, EDWARD DONOVAN, COMMISSIONERS; THE PRISON BOARD OF AUBURN STATE PRISON CONSISTING OF THE PRINCIPAL KEEPER, THE DEPUTY SUPERINTENDENT OF INDUSTRIES, THE HEAD PHYSICIAN AND THE WARDEN OF THE SAID INSTITUTION,

Respondents-Respondents

STATEMENT AS TO JURISDICTION

In compliance with Rule 12 of the Rules of the Supreme Court of the United States, as amended, petitioner-appellant submits herewith his statement particularly disclosing the basis upon which the Supreme Court has jurisdiction on appeal to review the judgment of the Court of Appeals entered in this cause.

Opinions Below

The opinion of the Special Term of the New York Supreme Court, granting petitioner's original application, is

reported in — N. Y. Misc. —, 101 N. Y. S. 2d 884. The opinion of the Appellate Division of the New York Supreme Court, reversing the order granting the petition, is reported in 278 N. Y. App. Div. 65, 103 N. Y. S. 2d 882, and this reversal was affirmed without opinion by the Court of Appeals, — N. Y. —, 103 N. E. 2d —. A motion by petitioner-appellant in the Court of Appeals for an amended remittitur to certify that a question under the Constitution of the United States was presented and necessarily passed upon is pending. Copies of the opinions below and of the order of the Court of Appeals are attached hereto as Appendix A.

Jurisdiction

The judgment of the Court of Appeals was entered on December 7, 1951. A motion for Reargument was denied March 13, 1952. A petition for appeal is presented to the Chief Judge of the Court of Appeals of New York herewith, to-wit, on March 14, 1952.

In this case petitioner has questioned the validity of 1936 and 1948 statutes of New York on the ground that they are repugnant to Article 1, Sec. 10, of the Constitution of the United States as *ex post facto* laws, when applied to prevent the release of petitioner-appellant on parole, as he would have been had the New York statutes in force in 1932 (at the time of his crime and sentence) been applied to him. The decision of the Court of Appeals was in favor of the validity of these statutes. Jurisdiction of the Supreme Court to review this decision by direct appeal is conferred by Title 28, United States Code, Section 1257(2), and is sustained by the decision in *Williams* v. *New York*, 337 U. S. 241.

As a basis for writ of certiorari (although not for appeal), petitioner-appellant further claimed that the Board of Parole denied him the right (claimed under the due process

clause of the Fourteenth Amendment of the Constitution of the United States) of being informed at his hearing before it of the issues then required to be heard under New York Correction Law, § 114.

The *ex post facto* question was first raised in petitioner's original Petition when he cited Article 1, Sec. 10 of the Constitution of the United States and stated:

Questions Presented

> "Can the Board of Parole use the power of discretion acquired under the laws enacted years after the petitioner's conviction and sentence been [sic.] imposed, to withhold his release at the expiration of the minimum"—etc. [Record, Fol. 81.]"

This was repeated in petitioner's Reply, when he charged the Board of Parole with "ignoring the lawful date of petitioner's sentence (December 2, 1932) and laws in force governing such sentence" when they exercised "the authority and power of discretion acquired by them under the laws of 1936 and later." He charged that "such abuse of discretion, extending the petitioner's prison term, without a just cause, not allowed under the laws of 1932, constitutes an *Ex Post Facto* in violation of petitioner's constitutional rights," and cited Article 1, Sec. 10 of the Constitution of the United States [Record, Fols. 90-92].

This question was cited by the Special Term in its opinion as being raised under that section of the Constitution [Record, Fol. 31], and was favorably passed on as the basis for its decision that petitioner's rights should be determined under the 1932 laws.

On appeal to the Appellate Division by the State of New York, that court in its opinion noted the claim of petitioner-appellant that the 1936 and 1946 amendments:

> "• • • increased his minimum sentence by depriving him of having his name certified to the gover-

nor for commutation of his minimum sentence, and consequently these amendments may not be applied to him." [Record, Fols. 294-5.]

The Appellate Division reversed, upholding the 1936 and 1948 statutes as applied to petitioner, and in its opinion stated that under the 1932 laws petitioner:

> "• • • had no legal right to a reduction in sentence as such a reduction rested in the discretion of the governor, and further, the governor has not lost that right by reason of any amendment to the statute." [Record, Fol. 295.]

On appeal to the Court of Appeals, petitioner-appellant in his Memorandum argued Point V under this heading:

> "The application to petitioner-appellant of the 1936 and 1948 statutes deprived him of substantial rights guaranteed to him by the United States Constitution's prohibition of *ex post facto* legislation by the states."

Assignments of error and bills of exception are not required under the New York practice on appeals to the Court of Appeal from orders such as this, under N. Y. Civil Practice Act § 607d, second paragraph.

The due process question was inartistically raised by petitioner in his Reply after the hearing before the Special Term. (From the state's "Statement under Rule 24" in the Record on its appeal from the Special Term's decision, it appears that petitioner had no counsel until the appeal.) The petitioner in his Reply complained that "at the hearing before the Board of Parole he was asked no questions." [Record, Fol. 194.] The Special Term's decision found that this was "not the 'hearing' that the law requires." The briefs filed by petitioner in the Appellate Division and in the Court of Appeals both raised the question that this

hearing "did not afford petitioner the due process of law guaranteed him by the Fourteenth Amendment to the United States Constitution," citing *Cole* v. *Arkansas*, 333 U. S. 196.

Both these questions were thus presented to the Court of Appeals. No opinion was filed in that court, but its affirmance of the dismissal of the Petition seems unquestionably to have been based upon the holding of the validity of the 1936 and 1948 state statutes as not *ex post facto*, and a decision that the Board of Parole's hearing did not deny petitioner due process of law.

Questions Presented

1. A New York statutory plan for compensation for good behavior for petitioner and other second offender convicts in force in New York in 1932 (the time of petitioner's crime and sentence) provided for their automatic release on parole, if the governor "in his discretion" allowed full compensation for good behavior when recommended by their prison boards.

a. Can a 1936 New York statute validly deprive petitioner of this conditional automatic release on parole, by providing that even if the governor "in his discretion" were to allow the full recommended compensation, petitioner's release should still be subject to the approval of the State Board of Parole?

b. Can a 1948 New York statute validly authorize the Board of Parole to deny release on parole to petitioner, after the full recommended compensation has been allowed to him by the prison boards, to which the governor's powers under the statutory compensation plan were transferred?

(These are the major issues; all the points raised in the Assignment of Errors are also presented.)

Statutes Involved

The New York statutes, the validity of which is involved, are set forth in Appendix B hereto. They are as follows:

Laws 1936, c. 70, §2, amending §212, found in 1 Laws of New York 1936, pp. 322-3.

Laws 1948, c. 631, § 1, amending §§ 235, 236, and 241, found in Laws of New York 1948, pp. 1136-7.

The laws in force in 1932 (the time of petitioner's crime and sentence) are also set forth in Appendix B. They are as follows:

Laws 1929, c. 243, Art. 9, §§ 233, 236, 237, 242 and 243, found in 1 Laws of New York 1929, pp. 584-588.

Laws 1932, c. 457, Art. 8, § 212, and c. 601, § 1, subparagraph 4, paragraph 7, amending § 230, found in 1 Laws of New York 1932, p. 1001 and 2 id., p. 1284.

These various laws are sections of the New York Correction Law as they were in force at the various dates given above.

Statement

The petitioner-appellant, Carmine Pizza, was convicted in the Queens County Court of New York for Murder in Second Degree, committed September 9, 1932. He was sentenced on December 2, 1932, to an indeterminate term of 20 years to life (fol. 120). This crime had been committed while he was on parole on a prior sentence for Manslaughter in the Second Degree (*People* v. *Pizza*, 238 N. Y. 622). Upon being received in prison on December 5, 1932, with this sentence of 20 years to life, the Board of Parole ruled that he had to serve the balance of the previous sentence before commencing the 20 years to life sentence (fols. 125, 126, 127). His second prison term was computed to commence on February 8, 1937.

By virtue of Penal Law § 2193 and allowance of compensation earned thereunder, the Prison Board of Auburn Prison on February 24, 1950, reduced petitioner-appellant's 20 year minimum term on his second sentence by 6 years, 7 months and 2 days for "good conduct and willing performance of duties assigned to him." It set "the date of expiration of minimum term" as April 14, 1950 (fol. 171). The reduction was duly signed by the Prison Board of Auburn Prison, and reported in accordance with Section 241 of the Correction Law. This reduction was on a sheet stating that he was "subject to the jurisdiction of the Board of Parole," and he was reported to the Parole Board "in order that he may be considered for parole by the New York State Board of Parole" (fol. 171) under the 1936 and 1948 statutes.

On March 3, 1950, the petitioner-appellant was called before the Parole Board, as a second offender, to determine his eligibility for parole.

At this time the Parole Board, after asking him only two questions about anything except the two criminal offenses for which he had been convicted (fols. 175-182), ruled he must serve three additional years, adding "reconsideration only, psychiatric report at that time" (fol. 182). Thereupon Carmine Pizza, petitioner-appellant, instituted this proceeding under Article 78 of the New York Civil Practice Act to compel a duty specifically enjoined by law, *i. e.*, to have his case treated under the rules and laws existing at the time when he was sentenced.

The original decision of the Special Term (fols. 22-54) recognized that petitioner-appellant's sentence had been effectively reduced by compensation or commutation by the Prison Board (which under Laws 1948, c. 631 has the powers formerly exercised by the Governor), so that he would have thereby been released, if the Parole Board had not held him to be subject to its jurisdiction under Laws

1936, c. 70, passed after he was sentenced. That Court also ruled that the hearing before the Parole Board was not "the hearing that the law required" (fol. 53). Following this decision, the Board of Parole released petitioner-appellant on parole.

The decision of the Appellate Division reversed the Special Term's order on the law. Thereafter, on March 30, 1951, the Special Term vacated its order of September 15, 1950, and remanded petitioner-appellant to prison again.

The Appellate Division held that the 1936 statute giving the Parole Board jurisdiction over second offenders such as petitioner-appellant did not deprive the Governor of his right to commute sentences, as it had existed in 1932, when the crime was committed, and hence was not an *ex post facto* law. It further held that under the 1932 statutes, petitioner-appellant had no right to an absolute release upon expiration of his minimum sentence.

The Court of Appeals affirmed the order of the Appellate Division, without opinion.

The Questions Are Substantial

The issues involved in this appeal are similar to those raised in *Lindsey* v. *Washington*, 301 U. S. 397. These issues are of importance to prisoners seeking to earn "good time" allowances in order to become eligible for release on parole, and to the administration of criminal justice in one of its most important areas. The last three decades have witnessed what Prof. Sheldon Glueck has called "a quiet revolution in the administration of criminal justice" through "the remaking of the procedures following conviction." (Review of Report to the Judicial Conference of the Committee on Punishment for Crime, 56 Harvard L. Rev. 839-840, 1943.) The emphasis in punishment has by degrees shifted from the determination of the *maximum* term for which a convicted defendant may be held, to the

determination of the *minimum* term at which he will be granted parole. This shift in emphasis was already clear fifteen years ago in the *Lindsey* case, where the 1935 Washington statute there held to be *ex post facto* as applied to crimes committed before its enactment had required the judges to fix each sentence at "the maximum provided by law for the crime of which such person was convicted," with power in the board of prison terms and paroles to reduce it and admit prisoners to parole for the balance of the maximum term. The general principle to be applied, as stated in the *Lindsey* case, is that a statute enacted after the commission of a petitioner's crime will be invalid if its changes operate "to the substantial disadvantage of petitioners," even if they do not enforce what is "technically an increase in the punishment annexed to the crime" (pp. 401-2).

1. A comparison of this case with the *Lindsey* case shows that they involve questions which are fundamentally similar.

(a) In *Lindsey*, defendants had a possibility under the law in force at the time of the crime of a sentence of less than 15 years.

In this case, petitioner had a possibility under the 1932 law (in force at the time of the crime) of an allowance of compensation for good behavior under the statutory plan.

(b) In *Lindsey*, defendants had a similar possibility under the later statute that the board of prison terms and paroles would fix a term of imprisonment of less than 15 years.

In this case petitioner had a similar possibility under the 1936 and 1948 statutes of an allowance of compensation for good behavior under the statutory plan. (In fact, such compensation was awarded to him on February 24, 1950.)

(c) In *Lindsey*, the later statute was held to be *ex post*

facto because it altered the consequences of a possible sentence for less than 15 years to defendants' substantial disadvantage in this respect—under the earlier law, upon expiration of their sentences defendants were entitled to be "freed from further confinement and the tutelage of a parole revocable at will," while under the later statute, they would be freed from further confinement but would remain on parole subject to the board's surveillance, and revocation or cancellation of the parole at will.

In this case, the later statutes also altered the consequences of an allowance of compensation to petitioner's equally substantial disadvantage in this respect—under the 1932 law, upon such allowance the petitioner would have been automatically released to serve the balance of his sentence outside the penitentiary upon parole (subject of course to parole conditions), while under the later statutes his release upon such allowance was subject to the discretion of the board of parole. (In fact, the board has refused to release him.)

The relative disadvantage to petitioner in this case from the later statutes is, if anything, even more substantial than was true in *Lindsey*. To confine in prison under later statutes one who would otherwise be free to serve his sentence outside the prison on parole, is surely a more serious disadvantage than to hold under parole surveillance under later statutes one who would otherwise be absolutely free. This is especially true now, when maximum sentences are common, and the determination of the actual term of confinement is largely left to parole boards through release on parole long before the maximum terms have been served, as has been true in New York for many years.

2. It is substantially admitted in the Appellant Division's opinion that the New York statutes of 1936 and 1948 would have this adverse effect on petitioner's chances of release

on parole. (Since the Court of Appeals did not file any opinion, the meaning ascribed to these statutes by the highest court of New York cannot be determined.) The Appellate Division recognized:

(a) That under the laws in force in 1932 (the date of petitioner's crime and sentence), he was as a second offender not subject to the jurisdiction of the board of parole (fol. 289); that as an indeterminate sentence prisoner he was entitled to be recommended to the governor for compensation credits (fol. 290); and that if the governor in his discretion did allow the reduction of a minimum sentence as recommended for a prisoner such as petitioner who was not subject to the jurisdiction of the parole board, the result would be his release, subject to parole conditions (fols. 291-2).

(b) That the 1936 statute purported to put petitioner under the jurisdiction of the board of parole (fol. 289) in which event it was discretionary with the board of parole whether or not he would be released on parole (fol. 291, and quotation from the Law Revision Commission construing the 1936 statute as it existed prior to the 1948 amendments at fols. 296-298).

(c) That under the 1948 statute, the governor's discretion to reduce sentences was vested in the prison boards and the parole board (fol. 292); and that petitioner's minimum sentence was reduced by compensation so as to expire on April 14, 1950 but that petitioner was not released on parole (fol. 288).

3. The two bases of the Appellate Division's decision against petitioner were that under the 1932 laws "he had no legal right to a reduction in sentence as such a reduction rested in the discretion of the governor," and "further the governor has not lost that right by reason of any amendment to the statute" (fol. 295).

(a) It was settled by the Supreme Court in *Lindsey* v. *Washington, supra,* that a possibility of favorable action is protected by the prohibition against *ex post facto* laws, as well as a legal right to favorable action. Certainly there was under the 1932 laws a possibility that petitioner would be allowed compensation by the governer to reduce his minimum sentence and entitle him to a release under parole conditions. This he lost under the 1936 statute, since the allowance of compensation by the governor no longer led to release on parole, but only to certification to the board of parole, which then had discretion whether or not to release him. It should further be noted that in petitioner's case there is no longer any question whether he will be allowed compensation, for it was in fact allowed to him on February 24, 1950.

(b) The fact that after the 1936 and 1948 statutes the governor still retained his constitutional power "to pardon or commute" given him by the New York State Constitution, Art. IV, Sec. 4 should not save these later statutes from *ex post facto* invalidity. For the plan of compensation and parole by the governor in force in 1932 for second offenders was not based upon his constitutional powers at all. (This is shown conclusively by the fact that the 1948 statute gave his authority to the prison and parole boards.) It was a statutory plan, and Laws 1929, c. 243, Art. 9, Sec. 237 even went so far as to provide that the governor "shall not increase the same [the amount of commutation or compensation] beyond the amount fixed by this article." The Appellate Division recognized in its opinion that the statutory plan was "customarily followed" by the governor until the 1948 amendment (fol. 295).

In the *Lindsey* case the governor of the State of Washington also had a constitutional pardoning power under Washington Constitution, Art. III, Sec. 9, and this was ex-

pressly preserved by Sec. 4 of the 1935 statute. But this did not save the 1935 statute, which operated to the petitioners' "substantial disadvantage" when it repealed a possibility given by an earlier statute that the trial judge would give a sentence of less than the statutory maximum. By the same token the fact that the governor of New York retained his constitutional pardoning powers even after the 1936 and 1948 statutes does not mitigate the "substantial disadvantage" under which the petitioner in this case was placed when the 1932 plan for statutory compensation and release on parole for second offenders was so drastically modified by the 1936 and 1948 statutes.

4. Only the very small class of prior felony offenders convicted of second degree murder before March 6, 1936 was affected adversely by the 1936 and 1948 statutes. Prior to this date, New York Penal Law § 2189 forbade the imposition of an indeterminate sentence upon any but first offenders—and all first offenders with indeterminate sentences were subject to the jurisdiction of the board of parole. The only exception was second degree murder, which had a mandatory indeterminate sentence of 20 years to life for all, whether first or subsequent offenders, under New York Penal Law §§ 1048 and 2189.

Thus in *People* v. *Washington*, 264 N. Y. 335, 191 N. E. 7, decided in 1934, the Court of Appeals held that robbery as a second offender required a definite term rather than an indeterminate sentence. The court went on to say that "there is, at this writing, no provision for parole of second offenders" (p. 338). This of course was true so far as parole by the board of parole was concerned, but the court did not say, and certainly could not have meant, that the statutory plan for allowance of compensation and release on parole by the governor was not then in force for second offenders.

5. This is apparently the first case to come before the Supreme Court involving the validity of subsequent statutes changing the conditions and effect of allowance of compensation to a petitioner's substantial disadvantage. Decisions on this question in state courts vary; the Supreme Court of Louisiana ruled in favor of a petitioner in a case much like the case at bar. See *State ex rel. Woodward* v. *Board of Parole*, 155 La. 699, 99 So. 534 (1924). The question seems ripe for decision by the Supreme Court of the United States.

It is submitted that the decision of the Court of Appeals fails to recognize the substantial disadvantage suffered by petitioner-appellant when the consequences of the possible (and in this case actual) allowance of compensation were changed by statutes passed after his crime and sentence. We believe the questions presented by this appeal are substantial, and that they are of public importance in the administration of criminal justice.

Respectfully submitted,

HENRY K. CHAPMAN,
(S.) FRANK COMPOTO,
Counsel for Appellant.

APPENDIX A

Opinion of the Special Term, August 14, 1950, reported in N. Y. Supreme Court, Cayuga County, Misc., 101 N. Y. S. 2d 884:

Warner, Justice.

The Petitioner herein has been twice convicted of a felony. The first conviction was the result of an explosion of a still which was illegally maintained on the Petitioner's property and the explosion of which caused the death of a police officer. Petitioner was convicted of Manslaughter in the Second Degree and was sentenced with an indeterminate term of from seven years and six months to fourteen years and six months. He was released on parole in January, 1930. The second felony conviction grew out of an altercation between the Petitioner and his wife's paramour which resulted in the death of the latter. Petitioner was convicted of Murder, Second Degree, and was sentenced by the Queens County Court on December 2, 1932, to an indeterminate term of twenty years to life. He entered Sing Sing Prison on December 4, 1932.

Thereafter, the Board of Parole ordered the Petitioner to serve the unserved portion of the first sentence before commencing the sentence of twenty years to life and said second sentence was fixed to commence November 4, 1938. Later, after the decision rendered in the case of People ex rel. Ingenito v. Warden and Agent of Auburn Prison, 293 N. Y. 803, 59 N. E. 2d 174, the date for the commencement of the twenty year to life sentence was changed from November 4, 1938, to that of February 8, 1937.

On February 23, 1950, the Prison Board of Auburn Prison made a report to the Warden of Auburn Prison, which said report stated that Carmine Pizza, the Petitioner herein, by his "conduct and efficient and willing performance of duties assigned" has "earned the amount of compensation set opposite his name" in said report, to wit: six years, seven months and two days; and that the date of the expiration of his minimum term was April 14, 1950.

Thereafter, on February 24, 1950, the said Prison Board reduced the minimum sentence of said Carmine Pizza "as allowed by the said Board as compensation for good conduct and willing and efficient performance of duties assigned to him" and specified the date April 14, 1950, in the column headed "date of expiration of minimum term" as the date of the expiration of his minimum term in order that he "may be considered for parole by the New York State Board of Parole, in accordance with the provisions of the law and the rules and regulations governing parole, under the conditions that he does not offend against the Laws of the State or the rules of the Prison, and willingly and efficiently performs the duties assigned to him, prior to his release on parole." Said instrument reducing the said sentence is approved by H. L. Bonesteel, acting for the Governor under the provisions of Chapter 631, Laws of 1948. Pursuant to notice, the Petitioner appeared before the Parole Board on March 3, 1950, and after a hearing the Parole Board rendered decision as follows: "Denied: held three years, reconsideration only, psychiatric report at that time."

The Petitioner complains that by the aforesaid decision of the Parole Board he will be deprived of his lawful right of parole for a period of three years, at least, beyond the date of expiration of his minimum term as certified by the Prison Board and approved by the Governor's representative, H. L. Bonesteel.

Petitioner has applied, under the provisions of Article 78 of the Civil Practice Act, to compel the above named Respondents, "to perform a duty specifically enjoined by law, i.e. to compel John A. Lyons, as a New York State Commissioner of Correction, and the New York State Board of Parole, consisting of Frederick A. Moran, Chairman, Louis F. Costume, Reginald B. Taylor, Donald H. Grant and Edward J. Donovan, Commissioners, to act and review the Petitioner's case, exercising all the power and jurisdiction conferred upon them by the rules and law as it stood (in 1932) at the time of Petitioner's arrest, conviction and sentence, eliminating all such power of discretion acquired by them afterward (under the later laws enacted after Peti-

tioner's sentence) culminating in additional punishment for the Petitioner (Right guaranteed by Article 1, Section 10 of the United States Constitution) and to recall him and release him on parole without further delay, under the rules and laws of 1932 enacted for such purpose. As for the Prison Board, consisting of the Principal Keeper, the Deputy Superintendent of Industries, the Head Physician and the Warden, to proceed with their duties and act in conformity of the rules and laws established for the purpose of accomplishing the Petitioner's release on parole."

The Parole Board, answering the petition herein, alleges in the paragraph marked "VI" of its answer, as follows, to wit: "That the Board of Parole in meeting and considering petitioner's case, acted entirely according to law, and their decision being a discretionary one, is therefore not judicially reviewable."

Respondents, in their Brief, refer to Section 212 of the Correction Law as enacted by the Laws of 1928, Chapter 485 and set out the last two sentences thereof which are as follows, to wit: "The time of his release shall be discretionary with the board of parole, but no such person shall be released until he has served such minimum sentence nor until he shall have served one year. The action of the board of parole in releasing prisoners shall be deemed a judicial function and shall not be reviewable if done according to law."

A reference to the full text of the aforesaid Chapter 485 discloses that the sentences above set forth are preceded by the following subject matter, viz: "Sec. 212. Prisoners subject to parole. Every person sentenced to an indeterminate sentence and confined in a state prison who has never before been convicted of a crime punishable by imprisonment in a state prison, when he has served a period of time equal to the minimum sentence imposed by the court for the crime of which he was convicted, shall be subject to the jurisdiction of the board of parole."

It appears that Petitioner was sentenced for the second felony to an indeterminate sentence but he had "before been convicted of a crime punishable by imprisonment in a state prison." It is obvious, therefore, that the provisions of

Chapter 485 of the Laws of 1928 with respect to the right of the Parole Board to exercise discretion with respect to the time of a prisoner's release do not apply to the petitioner who had previously been convicted of a crime punishable by imprisonment in a State Prison. Reichel *v.* Moore, 1936, 158 Misc. 301, 286 N. Y. S. 774. Said provisions do not furnish a proper basis of authority for the exercise by the Board of Parole of a discretionary power in this instance with respect to the time of release of the petitioner, nor do said provisions furnish a sound basis for Respondents' contention that the action of the Board of Parole shall not be reviewable in this instance. Respondents rely upon the provisions of Section 212 of the Correction Law, as amended by Chapter 70, Laws of 1936, which Section of the Correction Law had been then so amended as to eliminate reference to persons never before convicted of a felony. Respondents cite the case of Hines v. State Board of Parole, 293 N. Y. 254, 56 N. E. 2d 572, in support of their contention that "any reasons including evidence which they may have considered in arriving at their conclusion to defer parole, are confidential and are not judicially reviewable." The Court does not deem said authority in point. Hines had never before been convicted of a crime. Furthermore, Hines was arrested and convicted at a time when it is conceded that the Parole Board had acquired discretionary powers.

Chapter 824 of the Laws of 1930, Executive Law, Sec. 115, provides, among other things, as follows: "The board of parole shall meet at each of the institutions under its jurisdiction at such times as may be necessary for a full study of the cases of all prisoners eligible for release on parole and to determine when and under what conditions and to whom such parole may be granted."

Respondents drew attention to the aforesaid statutory provision in support of their argument that the Board of Parole had discretionary power with respect to the time of the Petitioner's release and might defer parole even though the Governor's representative had approved the Prison Board's reduction of sentence and determination of date of expiration of minimum sentence.

However, when considering the force and effect of the

above stated provisions of Chapter 824 of the Laws of 1930, with respect to the powers of the Parole Board, we must not overlook certain of the provisions of Section 210 of the Correction Law which were as follows, viz: "Sec. 210. Board of parole; powers and duties. Subject to other provisions of law, the board of parole in the division of parole of the executive department shall be charged with the duty of determining what prisoners serving an indeterminate sentence in state prisons and the Elmira Reformatory, may be released on parole and when and under what conditions."

The aforesaid provisions of the Correction Law became effective March 28, 1932, and were in effect when Petitioner was sentenced on December 2, 1932, to a term of twenty years to life for the crime of Murder, Second Degree.

The words "subject to other provisions of law" embodied in Section 210 of the Correction Law (effective when petitioner was sentenced for the second felony), serve to preserve the earlier restriction of the discretionary powers of the Parole Board so that no person convicted previously of a crime punishable by imprisonment in a State Prison for which he was sentenced prior to March 6, 1936, shall be subject to the exercise of judicial functions by the Parole Board with respect to the deferring of the time of his release or parole after his minimum sentence has been reduced by the Prison Board for "good conduct and willing and efficient performance of duties assigned to him," and the date of expiration of his minimum term fixed, and the same approved by the Governor.

To the same effect are certain of the rules of the Board of Parole for State Prisons and the Elmira Reformatory and laws relating to parole which were formulated by the Executive Department with the approval of the Legislature. Rule 5 of said Rules provides as follows, viz:

"5. At each meeting of the Board of Parole at the State Prisons, the Board will consider the cases of all indeterminate sentenced prisoners whose minimum terms will expire during the following months, and such other cases as they deem advisable.

"The Board of Parole does not grant or withhold release in the case of definite or *commuted sentence* (italics mine)

prisoners sentenced prior to March 6, 1936. It assumes jurisdiction over these prisoners only when they sign an agreement accepting the supervision of the Board of Parole for the period of time for which their sentences have been reduced through the operation of the commutation law. The contract or agreement which definite sentence prisoners sign includes the same conditions imposed upon the indeterminate sentence prisoners."

The term commutation and compensation in sections providing for reduction of sentence for good behavior, are used interchangeably. Ryan *v.* Lawes, 1934, 154 Misc. 572, 278 N.Y.S. 608.

The aforesaid rule does not restrict the Board of Parole from acting administratively. Neither does this Court intend that its determination that the said Board may not exercise any judicial functions with respect to the time of the release on parole of the Petitioner, be construed to mean that said Board may not assume jurisdiction over the petitioner (prisoner) when he shall have signed an agreement accepting the supervision of the Board of Parole, which agreement may very properly be formulated by the Board.

The Appellate Division of the Fourth Judicial Department, in the case of People ex rel. Mason *v.* Brophy, 1932, 235 App. Div. 432, 257 N.Y.S. 165, 166, has unanimously ruled: " * * * This argument is answered by the fact that the law has been so amended that the compensation is now deducted from the minimum rather than the maximum of the indeterminate sentence (chapter 348, Laws of 1931, amending section 230 [Subdivision 4] of the Correction Law), and the relator, if he has earned for himself by good conduct and by efficient and willing performance of his duties a compensation or diminution of his sentence, will be entitled to release or parole at the expiration of the minimum sentence imposed by the court, less the allowance credited to him for compensation, notwithstanding the provisions of section 212 of the Correction Law, added by Laws 1928, c. 485, Sec. 2, amended by Laws 1929, c. 243, Sec. 11."

It may properly be assumed that the Prison Board, when reducing the sentence of Petitioner, fixing the date of expiration of his minimum term and referring his case to the Parole Board, knew that the Petitioner came within the exception stated in the Laws of 1928, Chapter 485. The Parole Board should have paroled the Petitioner or refused to act on the ground that it had no jurisdiction. Instead it has denied parole and held the case for three years for reconsideration only with psychiatric report at that time. In so doing it has not acted "according to law."

Respondents in their brief cite the case of Siraguso *v.* Moore, 273 N. Y. 59, 6 N.E. 2d 97, 98, as an authority that a prisoner is not entitled to release on parole upon expiration of the minimum term less compensation. This authority does not apply here. The prisoner there was not sentenced to an indeterminate term where the maximum was "life" nor does it appear that there had been any reduction of sentence or fixing of any date of expiration of minimum term by a Prison Board. The Court when it said "No prisoner is entitled as a matter of right to release until he has served his maximum term minus credits for good behavior" obviously must have had in mind a maximum term stated *in years* (italics mine) since "life" is uncertain and when terminated the credits "for good behavior" would avail nothing.

A stenographic record of the "hearing" of the Petitioner by the Parole Board on March 3, 1950, is before this Court. An examination of this record discloses that in great part it was of a character which constituted an harassment of the prisoner with respect to the offense for which he was sentenced without a single question being directed to him as to whether or not "he will be suitably employed in self-sustaining employment if so released" nor generally into his eligibility for parole. Granting even that the Parole Board had the right in this instance to exercise a judicial function, the Court concludes that its "hearing" is not the "hearing" that the law required. Hines *v.* State Board of Parole, 1943, 267 App. Div. 99, 44 N.Y.S. 2d 655.

It is directed that John A. Lyons, as a New York State Commissioner of Correction and the New York State Board

of Parole, consisting of Frederick A. Moran, Chairman, Louis F. Costume, Reginald B. Taylor, Donald H. Grant and Edward J. Donovan, Comissioners, recall the Petitioner before said Parole Board, within sixty days, to again act upon the Petitioner's case, exercising all the powers and jurisdiction conferred upon them by the rules and law, as it stood in 1932, at the time of Petitioner's sentence, eliminating all such power of discretion acquired by them under laws enacted after Petitioner's sentence. Let order enter accordingly.

Opinion of the Supreme Court, Appellate Division, Fourth Department. March 20, 1951, reported in 278 N. Y. App. Div. 65, 103 N.Y.S. 2d 882:

Before Taylor, P. J., and McCurn, Vaughan, Kimball and Piper, JJ.

PIPER, *Justice:*

The order appealed from directs the Commissioner of Correction and the State Board of Parole to recall petitioner before the Parole Board within 60 days "to again act upon Petitioner's case, exercising all the powers and jurisdiction conferred upon them by the rules and law, as it stood in 1932, at the time of Petitioner's sentence, eliminating all such power of discretion acquired by them under laws enacted after Petitioner's sentence, and to act without further delay, under the rules and laws enacted for such purpose, before the termination of the sixty days' period ending on November 14, 1950."

Petitioner was sentenced on December 2, 1932, to a term of twenty years to life for the crime of murder, second degree. He had previously been convicted of the crime of manslaughter in the second degree, and sentenced to an indeterminate term of seven years, six months, minimum to fourteen years and six months maximum, and was on parole when the second felony was committed in 1932. When returned to prison on the second conviction he was required to serve until February 8, 1937, on his first sentence before commencing the second sentence. By credits received for

jail time and compensation, the minimum term of the second sentence expired on April 14, 1950, and that fact was certified to the Parole Board prior to March 3, 1950. On that date petitioner appeared before the Board. Its decision was that petitioner be "held three years, reconsideration only, psychiatric report at that time."

Petitioner then brought this proceeding under Article 78 of the Civil Practice Act to compel the appellants to release him on parole in accordance with the provisions of law in effect in 1932 when he was sentenced.

Prior to 1936 the Parole Board had no jurisdiction over second offenders. Chapter 70 of the Laws of 1936, effective March 6, 1936, amended section 223 of the Correction Law and broadened the Board's jurisdiction to every person given an indeterminate sentence to a State Prison on or after July 1, 1928.

Before the enactment of chapter 631 of the Laws of 1948 the Correction Law, Sec. 230 et seq., provided that when a prisoner serving an indeterminate sentence had received compensation credits which, if allowed, would reduce his minimum sentence so that it was about to terminate, the warden of the prison in which he was confined was required to forward to the Governor, through the department of correction, a report giving the name of the prisoner, the county in which he was convicted, a brief description of the crime, the date and term of sentence, the amount of reduction recommended and certain other information. On receipt of this report the Governor, in his discretion, might allow the reduction of the minimum sentence as recommended, in whole or in part. If the sentence was reduced by the Governor and the prisoner was subject to the jurisdiction of the parole board, the prisoner was certified by the Governor to the parole board as eligible for parole and it was then discretionary with the board whether or not he would be released on parole. Matter of Bitz *v.* Canavan, 257 App. Div. 247, 12 N. Y. S. 2d 200, affirmed 266 App. Div. 896, 42 N.Y.S. 2d 728. If the prisoner was not subject to the parole board, the governor might order his release, but in such case he annexed conditions, one of which was that the prisoner should be subject to the jurisdiction and control of the parole board.

On the recommendation of the Law Revision Commission (see 1948 report) the discretion formerly exercised solely by the governor in reducing sentences is vested in the Prison Boards and the Parole Board. Chapter 631 of the Laws of 1948. This act did not, however, attempt to remove from the governor his constitutional powers to pardon a prisoner or commute his sentence, N. Y. Constitution, art. IV, Section 4 as the statute provides: "Nothing herein contained shall be deemed to impair the power of the governor in any case to pardon or commute." Sec. 241, Correction Law.

The petitioner contends that when his minimum sentence was reduced by the prison board and that reduction certified to the parole board, he was entitled to be released on parole and that the parole board could not exercise its discretion in the matter. He argues that such was his right under the laws as they existed in 1932 when he was sentenced. The Special Term, Sup., 101 N.Y.S. 2d 884, has adopted that theory and made the order quoted in part above. The claim is based on the further contention that the amendment in 1936, giving jurisdiction over second offenders to the parole board, and the 1948 amendment granting further powers to that board and the prison boards, as to petitioner, increased his minimum sentence, by depriving him of having his name certified to the governor for commutation of his minimum sentence and consequently these amendments may not be applied to him. The fallacy of his argument lies in the fact that he had no legal right to a reduction in sentence as such a reduction rested in the discretion of the governor, and, further, the governor has not lost that right by reason of any amendment to the statute. The statutory procedure under which the governor acted was, it appears, a general rule which he customarily followed, but the statute did not and could not compel him to proceed as set forth therein as the constitution of the state gave him full authority to commute the sentence or to refuse to do so in his discretion with or without a recommendation from any official or board.

In its discussion of the effect of a reduction of sentence under the statute in effect prior to the 1948 amendments, the

Law Revision Commission used this language: "The granting of a reduction of sentence operates, in the case of indeterminate sentence prisoners, to make the prisoner eligible for parole at an earlier date." Citing People ex rel. von Moser *v.* New York State Parole Board, 266 App. Div. 896, 42 N. Y. S. 2d 728. "It does not entitle him to release on parole, since the granting of a release on parole rests entirely in the discretion of the Board of Parole, after investigation of each individual case." Citing the von Moser case, also Bitz *v.* Canavan, 257 App. Div. 247, 12 N. Y. S. 2d 862, affd. 281 N. Y. 699, 23 N.E. 2d 536, supra; Angione *v.* Murphy, 257 App. Div. 1020, 13 N. Y. S. 2d 243, motion for leave to appeal denied 281 N. Y. 883, 22 N. E. 2d 765. "The prerequisites to a reduction of sentence are not, in themselves, a sufficient basis for parole. Since the reduction operates only on the minimum, and not on the maximum of an indeterminate term, the effect is, not to shorten the sentence, but merely to make it possible for the prisoner to serve a greater portion of the remainder of the sentence in a different manner—i.e., to serve it outside the prison walls, under supervision—if the Parole Board shall decide that parole is desirable. An indeterminate sentence is regarded as a sentence for the maximum term prescribed." See 1948 Report of N. Y. Law Revision Commission, pages 548, 549.

The wording of the order appealed from does not, followed literally, compel the parole board to take any action, as the board had no jurisdiction over second offenders in 1932. The attorney general has construed it to require the board to release petitioner on parole, and reading the decision with the order, that was probably the intent of the Special Term. Such an order can only be affirmed if the petitioner had a clear legal right to the relief granted. We think he did not have that right as the amendments to the Correction Law in 1936 and 1948 deprived him of no reduction in sentence, the statutory changes merely gave additional jurisdiction to the parole board and prison boards, without taking from the governor any power he had to commute or pardon, which power he may still exercise in behalf of petitioner, if he so determines.

It follows that the order should be reversed and the petition dismissed.

Order reversed on the law and petition dismissed.

All concur.

Order of the Court of Appeals, December 7, 1951, on Affirmance Without Opinion, — N. Y. —, 103 N. E. 2d.:

Be it remembered, that on the 8th day of June in the year of our Lord one thousand nine hundred and fifty-one, Carmine Pizza, the appellant—in this cause, came here unto the Court of Appeals, by Frank Composto, his attorney—, and filed in the said Court a Notice of Appeal and return thereto, from the order of the Appellate Division of the Supreme Court in and for the Fourth Judicial Department. And John A. Lyons, as a New York State Commissioner of Correction, & ors., & c., the respondents in said cause, afterwards appeared in said Court of Appeals by Nathaniel L. Goldstein, Attorney General.

Which said Notice of Appeal and the return thereto, filed as aforesaid, are hereunto annexed.

Whereupon, The said Court of Appeals, this cause having been submitted, after due deliberation had thereon, did order and adjudge that the order of the Appellate Division of the Supreme Court appealed from herein be and the same hereby is affirmed.

And it was also further ordered, that the records aforesaid, and the proceedings in this Court, be remitted to the said Supreme Court, there to be proceeded upon according to law.

Therefore, it is considered that the said order be affirmed as aforesaid.

And hereupon, as well the Notice of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the Supreme Court of the State of New York before the Justices thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains

in the said Supreme Court, before the Justices thereof, &c.

RAYMOND J. CANNON,
Clerk of the Court of Appeals of the State of New York.

Court of Appeals, Clerk's Office,
Albany, December 7, 1951.

APPENDIX B

I. Laws in effect in 1932 governing parole and commutation of sentence of petitioner-appellant.

(1) Not subject to Parole Board.

1 Laws of New York 1932, p. 1001, c. 457, Article 8:

> Sec. 212. Prisoners subject to parole. Every person sentenced to an indeterminate sentence and confined in a state prison who has never before been convicted of a crime punishable by imprisonment in a state prison, when he has served a period of time equal to the minimum sentence imposed by the court for the crime of which he was convicted, shall be subject to the jurisdiction of the board of parole. The time of his release shall be discretionary with the board of parole, but no such person shall be released until he has served such minimum sentence nor until he shall have served one year. The action of the board of parole in releasing prisoners shall be deemed a judicial function and shall not be reviewable if done according to law.

(2) Compensation for good behavior to be deducted from minimum term.

2 Laws of New York 1932, p. 1284, c. 601, Sec. 1, sub-paragraph 4, paragraph 7, amending Sec. 230:

> In the case of a definite sentence prisoner, said compensation shall be deducted from the term as imposed by the court, less jail time allowance, and in the case

of an indeterminate sentence prisoner compensation shall be deducted from the minimum term of such sentence, less jail time allowance. * * *

(3) Statutory commutation plan for allowance of compensation.

Laws of New York 1929, pp. 584-8, c. 243, Article 9:

Sec. 233. Monthly report of warden to governor. On any day not later than the seventh day of each month, the warden or superintendent of each of the state correctional institutions and of each of the penitentiaries in this state shall forward to the governor through the department of correction a report, directed to him, of any prisoner whose term may be diminished and who may be released the following month, by reason of the commutation of his or her sentence, or on account of compensation earned, in the manner provided in this article, which may be written or printed, or partly written and partly printed, which shall be uniform as to size and arrangement, which size and arrangement shall be fixed by the governor, and shall contain the following information, distinctly written, namely: The full name of the prisoner, together with any alias which he or she may be known to have, the name of the county where the conviction was had, a brief description of the crime of which the prisoner was convicted, the name of the court in which the conviction was had, the name of the presiding judge, the date of sentence, the date of reception in the prison or penitentiary and the term and fine. In all cases the report shall show the amount of commutation and compensation recommended, and the date of the expiration of the term and, in the case of prisoners not subject to the jurisdiction of the parole board, the date when he may be released, if such commutation or compensation, or either, be allowed.

Sec. 236. Determination of commutation and compensation. For the purpose of applying the rules mentioned in the last section for the allowance or disallowance of commutation for the good conduct of any

prisoner, and for the allowance of compensation under the provisions of this article for efficient and willing performance of duties assigned, a board shall be constituted in each of the prisons of this state, to consist of the warden, the principal keeper, the physician and the officer in charge of industries therein and, in each of the penitentiaries of this state, the warden or superintendent, the deputy or principal keeper and the physician therein, or of the person acting in their place and stead. This board shall meet once in each month before the date fixed for the transmission of their report to the governor, as hereinbefore provided, and proceed to determine the amount of commutation and compensation which they shall recommend to be allowed to any prisoner, which shall not in any case exceed the amount fixed by this article. They shall have full discretion to recommend the withholding of the allowance of commutation for good conduct, or compensation, or of a part thereof, as a punishment for offenses against the discipline of the prison or penitentiary, in accordance with the rules hereinbefore mentioned, except that a prisoner received in a prison or penitentiary prior to May first, nineteen hundred and sixteen, shall be credited with an allowance of ten days compensation for each thirty day period, dating from the date of his confinement in prison to May first, nineteen hundred and sixteen. Compensation credited to a prisoner in the first instance, in his account, by the warden, as provided in section two hundred and thirty, shall stand as the compensation allowed, unless withheld wholly or partly by the board as punishment, as above provided.

Sec. 237. Review by the governor. In all cases, however, where the board shall recommend the withholding of the allowance of the whole or any part of commutation or compensation for good conduct, they shall forward, with their report to the governor their reasons in writing, for such disallowance, and the governor may, in his discretion, decrease or increase the amount of commutation or compensation as recom-

mended by the said board, but he shall not increase the same beyond the amount fixed by this article.

Sec. 242. Power of governor to grant compensation or commutation. The governor, upon receipt of the report recommending the allowance of diminution of sentences of prisoners as provided for in this article may, in his discretion, allow the same, in whole or in part, as to any or all of such prisoners. He shall place the names of all prisoners whose sentences he may determine to reduce upon a list prepared in duplicate, each of which shall have his written order annexed thereto directing such reduction and specifying the date of expiration of the minimum term as reduced. He shall place the names of all other prisoners so reported whose sentences he may determine to reduce upon his warrant for their release, specifying the date of release in each case. Such warrant shall be directed to the warden or superintendent of the state correctional institution or the warden or superintendent of the penitentiary, wherein such prisoners may be confined. One copy of any such list of prisoners subject to the jurisdiction of the parole board, with the accompanying order, shall be transmitted by the governor to the parole board and one copy to the warden of the prison in which the prisoners named in the list are confined. The warden shall give immediate written notice thereof to each prisoner whose minimum term is thereby reduced. Any such warrant for the release of other prisoners shall be transmitted to the officer to whom it is directed, who shall thereupon proceed to execute such warrant by releasing the prisoners mentioned therein on the date fixed for their release into the custody of board of parole. Such prisoners shall thereupon be allowed to go on parole outside of said prison walls and inclosure upon such terms and conditions as the board of parole for such state prison shall prescribe, but to remain while so on parole in the legal custody and under the control of the warden of the state prison from which he is so released until the expiration of the term of his sentence subject to the pro-

visions of article eight hereof, excepting section two hundred and eighteen thereof.

Sec. 243. Governor to annex condition to discharge. The governor shall, in reducing the sentences of prisoners not subject to the jurisdiction of a board of parole, annex a condition that such prisoner shall live and remain at liberty without violating the law, and be subject to the jurisdiction and control of the board of parole for the state prison from which he is released as provided in article eight hereof, excepting section two hundred and eighteen thereof, and also a condition to the effect that if any such prisoner shall, during the period between the date of his discharge by reason thereof and the date of the expiration of the full term for which he was sentenced, be convicted of any felony, committed in the interval as aforesaid, he shall, in addition to the sentence which may be imposed for such felony and before beginning the service of such sentence be compelled to serve in the prison or penitentiary in which he may be confined for the felony for which he is so convicted, the remainder of the term without commutation which he would have been compelled to serve but for the commutation of his sentence as provided for in this article.

II. Text of the 1936 amendment, making petitioner-appellant's release subject to approval of Parole Board:

1. Laws of New York 1936, pp. 322-3, c. 70, Sec. 2, amending Sec. 212 to read as follows:

Sec. 212. Prisoners subject to parole. Every person sentenced to an indeterminate sentence and confined in a state prison, when he has served a period of time equal to the minimum sentence imposed by the court for the crime of which he was convicted, shall be subject to the jurisdiction of the board of parole. The time of his release shall be discretionary with the board of parole, but no such person shall be released until he has served such minimum sentence nor until he shall have served one year. The action of the board of

parole in releasing prisoners shall be deemed a judicial function and shall not be reviewable if done according to law.

III. Text of the relevant 1948 amendments, taking away the Governor's statutory power to allow compensation, and conferring it upon the Prison Boards.

Laws of New York 1948, pp. 1136-7, c. 631, Sec. 1:

Sec. 235. Determination of reduction of sentence. For the purpose of applying the rules mentioned in the last section for the allowance or disallowance under the provisions of this article of reduction for the good conduct of any prisoner, and for efficient and willing performance of duties assigned, a board shall be constituted in each of the prisons of this state, to consist of the warden, the principal keeper, the physician and the officer in charge of industries therein and, in each of the penitentiaries of this state, the warden or superintendent, the deputy or principal keeper and the physician therein, or of the persons acting in their place and stead. This board shall meet once in each month before the date fixed for the transmission of their report to the commissioner of correction, as hereinbefore provided, and proceed to determine the amount of reduction of sentence which they shall allow to any prisoner, which shall not in any case exceed the amount fixed by this article. They shall have full discretion to withhold the allowance of reduction of sentence for good conduct and for efficient and willing performance of duties assigned, or of a part thereof, as a punishment for offenses against the discipline of the prison or penitentiary, in accordance with the rules hereinbefore mentioned. Reduction credited to a prisoner in the first instance, in his account, by the warden, as provided in section two hundred and thirty, shall stand as the reduction allowed, unless withheld wholly or partly by the board as punishment, as above provided.

Sec. 236. Report when allowance withheld. In all cases, however, where the board shall withhold the allowance of the whole or any part of reduction of

sentence for good conduct and for efficient and willing performance of duties assigned, they shall forward with their report to the commissioner of correction their reasons, in writing, for such disallowance. The action of the board in granting or withholding reductions shall be deemed a judicial function and shall not be reviewable if done according to law.

Sec. 241. Form of order. Upon completion of their determination as provided in section two hundred thirty-five, the board shall place the names of all prisoners whose sentences it may determine to reduce who are subject to the jurisdiction of the parole board upon a list prepared in duplicate, each of which shall have annexed thereto a written order signed by the members of the board, declaring such reduction and specifying the date of expiration of the minimum term as reduced. It shall place the names of all other prisoners whose sentences it may determine to reduce upon its warrant for their release, specifying the date of release in each case. Such warrant shall be directed to the warden or superintendent of the state correctional institution or the warden or superintendent of the penitentiary, wherein such prisoners may be confined. One copy of any such list of prisoners subject to the jurisdiction of the parole board, with the accompanying order, shall be transmitted to the parole board, and one copy to the warden of the prison in which the prisoners named in the list are confined. The warden shall give immediate written notice thereof to each prisoner whose minimum term is thereby reduced. Any such warrant for the release of other prisoners shall be transmitted to the officer to whom it is directed, who shall thereupon proceed to execute such warrant, by releasing the prisoners mentioned therein on the dates fixed for their release into the custody of the board of parole. Every such prisoner shall thereupon be allowed to go on parole outside of said prison walls and inclosure upon such terms and conditions as the board of parole for such state prison shall prescribe, but to remain while so on parole in the legal custody

and under the control of the warden of the state prison from which he is so released until the expiration of the term of his sentence subject to the provisions of article eight hereof. Nothing herein contained shall be deemed to impair the power of the governor in any case to pardon or commute.

Footnote to the above, found in Laws of New York 1948, p. 1134:

"These are amendments recommended by the Law Revision Commission. See Leg. Doc. (1948) No. 65 (M). Their purpose is to permit the Prison Boards to put into effect directly the reductions of sentences to state prisons and penitentiaries, for good behavior and diligent performance of duties, which are now made by the Governor, in the exercise of executive discretion, upon recommendation of the Prison Boards. The action of such Prison Board in granting or withholding such reductions is made a judicial function and is not reviewable. This provision is in accordance with the present provision of Correction Law, section 212, with respect to parole, which has been upheld by the courts. No change is made in the amounts of the reduction which are allowable, or in the manner in which the amount of reduction earned by each prisoner is determined by the Prison Boards, or in the conditions upon which reductions are granted. The provisions of the act are made applicable to prisoners confined for crimes committed before June 1, 1935 as well as thereafter. These changes do not affect the constitutional power of the Governor to grant reprieves, commutations and pardons."

"Endorsed." Within Received 3/19/52. Nathaniel L. Goldstein, Attorney General.

"Endorsed."

Cayuga County Clerk's office.

Filed March 25, 1952, Action No. 2337.

In re Appl. for Orders in Pursuance of the Provisions of Art. 78 of the C. P. A. in Favor of Carmine Pizza, Pet.-Applt. vs. John A. Lyons, as a N. Y. Commr. of Correction, etc., Respts-Respts.

STATE OF NEW YORK,
Cayuga County Clerk's Office, ss:

I, James D. Shayler, Clerk of the County of Cayuga, and of the Supreme Court of said State, and of the County Court of said County, each being a Court of Record and having a Common Seal, do hereby certify that I have compared the annexed and foregoing copy of Jurisdictional Statement, with the original entered on March 25, 1952, in this office and now remaining on file and that the same is a correct copy of such original and of the whole thereof.

In Testimony Whereof, I have hereunto set my hand and affixed the Seal of said County and Courts, at Auburn, N. Y., this 5 day of May, 1952.

James D. Shayler, Clerk. (Seal.)

Office - Supreme Court, U. S.
FILED
MAY 10 1952
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951

No. 760

CARMINE PIZZA,

Appellant,

v.

JOHN A. LYONS, AS NEW YORK STATE COMMISSIONER OF CORRECTION, ET AL.,

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APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

MOTION TO AFFIRM

NATHANIEL L. GOLDSTEIN,
Attorney General of the State of New York;

WENDELL P. BROWN,
Solicitor General of the State of New York;

HERMAN N. HARCOURT,
Assistant Attorney General of the State of New York,
Counsel for Appellees.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951

No. 760

IN THE MATTER OF THE APPLICATION FOR ORDER IN PURSUANCE OF THE PROVISIONS OF ARTICLE 78 OF THE CIVIL PRACTICE ACT, IN FAVOR OF CARMINE PIZZA,

Appellant,

v.

JOHN A. LYONS, AS A NEW YORK STATE COMMISSIONER OF CORRECTION; THE NEW YORK STATE BOARD OF PAROLE CONSISTING OF FREDERICK A. MORAN, CHAIRMAN, LOUIS F. COSTUMA, REGINALD B. TAYLOR, DONALD H. GRANT, EDWARD DONOVAN, COMMISSIONERS; THE PRISON BOARD OF AUBURN STATE PRISON CONSISTING OF THE PRINCIPAL KEEPER, THE DEPUTY SUPERINTENDENT OF INDUSTRIES, THE HEAD PHYSICIAN AND THE WARDEN OF THE SAID INSTITUTION

APPEAL FROM THE SUPREME COURT, COUNTY OF CAYUGA, STATE OF NEW YORK

MOTION TO AFFIRM

May It Please the Court:

Now come the respondents-appellees in the above entitled cause by their counsel of record and move that the order and judgment appealed from be affirmed.

Jurisdiction

Jurisdiction would appear to exist if the allegations of the appellant were substantial and substantiated.

Motion to Affirm

The motion to affirm is made upon the ground that the decision of the cause depends upon the resolution of the question whether the amendments to New York Correction Law Sections 212, 223 (Laws of 1936, ch. 70) and 242 (Laws of 1935, ch. 902; Laws 1948, ch. 631), as applied to the appellant who was previously convicted of a felony, are unconstitutional as being *ex post facto* laws. The pertinent statutes are New York Correction Law Sections 212, 223, 230, 233, 236, 237 and 242, some of which are reproduced by the appellant in Appendix B annexed to his jurisdictional statement, and the remainder are contained in the Appendix to this Motion to Affirm.

Prior to the amendments, the appellant who had been convicted in 1932 of the crime of murder, second degree, as a second offender, and sentenced to a term of twenty years to life, could only hope to be released from prison by an act of executive clemency.

> "• • • An indeterminate sentence is regarded as a sentence for the maximum term prescribed. (*People* v. *Adams*, 176 N.Y. 351, 362.) The appellant, though sentenced to a term indeterminate in form, has in fact been sentenced to what is a flat term of sixty years. That is so because there is, at this writing, no provision for the parole of second offenders. (See Correction Law, § 223; Cons. Laws, ch. 43.) The minimum term of thirty years means nothing." (*People* v. *Washington*, (1934) 264 N.Y. 335, 338.)

Therefore in 1932 the situation of the appellant as a second offender sentenced to a term of from twenty years

to life was that of one for whom no provision for parole existed, and whose sentence although indeterminate in form, was actually a flat term for life. The minimum term of twenty years meant nothing.

Under these circumstances it would seem that the provision contained in Correction Law Section 230 in 1932 that "No person received in a state prison after July first, nineteen hundred and twenty-six, sentenced to life imprisonment or to imprisonment during his natural life shall have his term diminished either by commutation or compensation, but such person shall serve the full term for which he was sentenced" has a peculiar and devastating significance.

It will be noted that Sections 212 and 223 of the State Correction Law, as they were at the time of appellant's conviction, specifically excluded a prisoner previously convicted of a crime punishable by imprisonment in a state prison from the benefits of parole therein provided. This prohibition was removed from these sections of the law by Chapter 70 of the Laws of 1936.

The amendment in 1948 to State Correction Law Section 230 and the amendment of the same year to Section 242 removed the appellant from the operation of the prohibitions previously existing and permitted him to enjoy the same status as a person convicted for the first time of the crime of murder in the second degree, who had received a sentence of twenty years to life. His minimum sentence could be reduced by the allowance of "earned good time" and he could be admitted to parole.

Thus it is apparent that the amendments of 1936 and 1948 were not *ex post facto*. They ameliorated the conditions under which appellant previously labored by permitting him to be considered for a "statutory" commutation, and he never was deprived of possible executive clemency should the Governor so determine under his

constitutional powers (New York State Constitution Article IV, § 4). In passing it is to be noted that although the Governor usually did attach the conditions suggested by the Legislature in commuting sentences, this

> "• • • was only a courteous gesture toward the Legislature, as that body could neither add to nor detract from the explicit grant by the People of the State". (*People ex rel. Ross* vs. *Wilson*, 250 App. Div. 143, 145)"

The appellant places great reliance upon *Lindsey* v. *Washington*, 301 U.S. 397, and attempts to draw a parallel between that case and this on page 7 of his jurisdictional statement. However a more careful analysis of both cases will reveal that they are not analogous. In the *Lindsey* case the statute under question required a *mandatory* sentence of fifteen years, whereas the statute in existence at the time of the commission of Lindsey's crime did not provide for such a mandatory sentence. Also in the *Lindsey* case the minimum sentence was removed from the power of the court to impose and left to the whim of the Board of Parole. In this case the penal statute was not changed, but the procedural changes in the statute were effected to provide relief to the appellant from the prohibitions and disqualifications as to allowance of "earned good time" and parole under which he previously suffered. Surely these provisions cannot be said to have been more onerous so as to render the later laws *ex post facto* as to the appellant.

The amendment of 1948 to Section 242 placed the statutory and discretionary power to reduce the sentence of a prisoner solely in the prison board but did not affect the Governor's constitutional clemency powers. The interjection of the Parole Board into the picture under the 1948 amendment was not new, inasmuch as the Parole Board

was given jurisdiction over a prisoner in the appellant's position by the 1936 amendment in order to ameliorate his previous position of not being eligible to parole at all.

Since the exercise of executive clemency is an act of grace and not of right, it does not appear that any constitutional right of the appellant has been invaded. The power of executive clemency may be delegated. This Court in *Solesbee* v. *Balkcom*, 339 U.S. 9 said, p. 12:

> "Power of executive clemency in this country undoubtedly derived from the practice as it had existed in England. Such power has traditionally rested in governors or the President, although some of that power is often delegated to agencies such as pardon or parole boards. Seldom, if ever, has this power of executive clemency been subjected to review by the courts. See *Ex parte United States*, 242 U.S. 27, 42, and cases collected in Note, 38 L.R.A. 577, 587."

Opinions Below

The opinions of the courts below are contained in Appendix A annexed to appellant's jurisdictional statement, and are therefore not repeated here.

Dated: March 27, 1952.

NATHANIEL L. GOLDSTEIN,
Attorney General of the
State of New York,
Attorney for Respondents-Appellees;
WENDELL P. BROWN,
Solicitor General of the
State of New York;
HERMAN N. HARCOURT,
Assistant Attorney General,
of the State of New York,
Counsel for Respondents-Appellees,
The Capitol, Albany, N. Y.

APPENDIX

NEW YORK STATE CORRECTION LAW

Article 8 (consisting of §§ 210-223)

In 1932:

§ *223. Application of article.* The provisions of this article shall apply to every person sentenced to an indeterminate sentence on or after July first, nineteen hundred and twenty-eight, and confined in a state prison and who has never before been convicted of a crime punishable by imprisonment in a state prison. It shall not apply to any other persons. All provisions of law applying to the parole of prisoners sentenced to prison before July first, nineteen hundred and twenty-eight and repealed by this act shall be transferred to the rules of the board of parole and shall continue to have the same force and effect of law as before this repeal. (L. 1932, c. 457, § 1)

As amended by Laws of 1936:

§ *223. Application of article*

The provisions of this article shall apply to every person sentenced to an indeterminate sentence on or after July first, nineteen hundred and twenty-eight, and confined in a state prison. All rules of the board of parole applying to the parole of prisoners sentenced to prison before July first, nineteen hundred and twenty-eight, shall continue to have the force and effect of law. As amended L. 1932, c. 457; L. 1936, c. 70, § 3, eff. March 6, 1936.

NEW YORK STATE CORRECTION LAW

Article 9 (§§ 230-249)

In 1932:

§ *230* (L. 1932, c. 601, § 1).

• • •

Every prisoner received in a state prison or penitentiary on or after July first, nineteen hundred thirty-two, under

either a definite or indeterminate sentence, may earn compensation not to exceed seven and one-half days for each month of his minimum term in the case of an indeterminate sentence, or on the term as imposed by the court in the case of a definite sentence.

In the case of a definite sentence prisoner, said compensation shall be deducted from the term as imposed by the court, less jail time allowance, and in the case of an indeterminate sentence prisoner compensation shall be deducted from the minimum term of such sentence, less jail time allowance. * * * No person received in a state prison after July first, nineteen hundred and twenty-six, sentenced to life imprisonment or to imprisonment during his natural life shall have his term diminished either by commutation or compensation, but such person shall serve the full term for which he was sentenced. * * *

NOTE: Correction Law Section 230 was extensively amended by L. 1935, c. 902. However § 16 of that law specifically prohibited any retroactive effect thereof.

In 1948: (The section was amended and the subdivision renumbered.)

§ 230. *Definite sentence; indeterminate sentence; discretionary reduction of sentence.* 1. A sentence to imprisonment in a state prison for a definite fixed period of time is a definite sentence. A sentence to imprisonment in a state prison having minimum and maximum limits fixed by the court or the governor is an indeterminate sentence.

2. Every prisoner confined in a state prison or penitentiary may receive, for good conduct and efficient and willing performance of duties assigned, a reduction of his sentence not to exceed ten days for each month of the minimum term in the case of an indeterminate sentence, or of the term as imposed by the court in the case of a definite sentence. The maximum reduction allowable under this provision shall be four months per year, but nothing herein contained shall be construed to confer any right whatsoever upon any prisoner to demand or require the whole or any part of such reduction.

3. In the case of a definite sentence prisoner, said reduction shall be computed upon the term of the sentence as imposed by the court, less jail time allowance, and in the case of an indeterminate sentence prisoner said reduction shall be computed upon the minimum term of such sentence, less jail time allowance. No prisoner, however, shall be released under the provisions hereof from a state prison until he shall have served at least one year, nor shall any prisoner confined in a penitentiary have his sentence reduced under the provisions hereof until he shall have served at least three months exclusive of jail time. No prisoner sentenced to life imprisonment or to imprisonment during his natural life shall have his term reduced by the provisions hereof. Subject to the rules of the commissioner of correction, the maximum reduction of ten days in each month may, in the discretion of the board hereinafter provided for, be in whole or in part withheld, forfeited or cancelled, in accordance with the rules of the commissioner of correction for bad conduct, violation of prison rules or failure to perform properly duties assigned.

4. An account based upon the maximum reduction of ten days in each month shall be kept in suitable books by the warden for each prisoner who may be entitled to benefit from reductions under the provisions of this section, and at the end of each month the warden shall tentatively credit the prisoner with the portion of such reduction for such period as the case may justify.

In re Appl. for Order in Pursuant of the provisions of Art. 78 of the C.P.A. in favor of Carmine Pizza Pet. Applt. vs. John A. Lyons as a New York State Commrs. of Correction, et al., Respts. Respts.

STATE OF NEW YORK,
Cayuga County Clerk's Office, ss:

I, JAMES D. SHAYLER, Clerk of the County of Cayuga, and of the Supreme Court of said State, and of the County Court of said County, each being a Court of Record and having a Common Seal, do hereby certify that I have compared the annexed and foregoing copy of Statement and

Motion to Affirm, with the original entered on March 31, 1952, in this office and now remaining on file and that the same is a correct copy of such original and of the whole thereof.

In Testimony Whereof, I have hereunto set my hand and affixed the Seal of said County and Courts, at Auburn, N. Y., this 5 day of May, 1952.

James D. Shayler, Clerk. (Seal.)

"Endorsed."
Cayuga County Clerk's office.
Filed March 31, 1952, at 9:30 A. M. Action No. 2337.

Office - Supreme Court, U. S.
FILED
MAY 10 1952
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1951

No. 760

In the Matter of

The Application for Order in Pursuance of the provisions of Article 78 of the Civil Practice Act, in favor of

CARMINE PERA,

Petitioner-Appellant,

v.

JOHN A. LYONS, as a New York State Commissioner of Correction; the NEW YORK STATE BOARD OF PAROLE consisting of Frederick A. Moran, Chairman, Louis F. Costuma, Reginald B. Taylor, Donald H. Grant, Edward Donovan, Commissioners; THE PAROLE BOARD OF AUBURN STATE PRISON consisting of the Principal Keeper, the Deputy Superintendent of Industries, the Head Physician and the Warden of the said Institution,

Respondents-Respondents.

Appeal from the Supreme Court, County of Cayuga, State of New York.

BRIEF IN OPPOSITION TO MOTION TO AFFIRM

HENRY K. CHAPMAN,
Counsel for Petitioner-Appellant.
291 Broadway,
New York, N. Y.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1951

No. .....

In the Matter of

The Application for Order in Pursuance of the provisions of Article 78 of the Civil Practice Act, in favor of

CARMINE PIZZA,
Petitioner-Appellant,

v.

JOHN A. LYONS, as a New York State Commissioner of Correction; the NEW YORK STATE BOARD OF PAROLE consisting of Frederick A. Moran, Chairman, Louis F. Costuma, Reginald B. Taylor, Donald H. Grant, Edward Donovan, Commissioners; THE PRISON BOARD OF AUBURN STATE PRISON consisting of the Principal Keeper, the Deputy Superintendent of Industries, the Head Physician and the Warden of the said Institution,
Respondents-Respondents.

BRIEF IN OPPOSITION TO MOTION TO AFFIRM

Jurisdiction

The New York Court of Appeals has amended its remittitur in this case to certify that a question under the Fed-

eral Constitution was presented and necessarily passed upon by that Court. The amended remittitur is contained in Appendix A to this Brief.

The Questions Are Substantial

Petitioner-appellant contends that 1936 and 1948 statutes have deprived him of substantial advantages under the 1932 laws in force when his crime was committed, as follows:

(a) The 1932 New York statutory compensation plan gave him a possibility of allowance of compensation for good behavior by the Governor in his discretion, and provided that *if* the Governor did allow the recommended compensation, he should be automatically released under the Governor's warrant to serve the balance of his sentence outside the penitentiary, subject to parole conditions.

(b) The 1936 and 1948 statutes transferred the power to grant or deny compensation to the Prison Boards, and provided that *if* compensation was granted (as it has been in the case at bar), petitioner-appellant should not be released unless the Board of Parole also approved of his release.

1. Respondents-appellees in their motion to affirm have first argued that "no provision for parole existed" in 1932 for a second offender such as petitioner-appellant, and that his only hope was a release "by executive clemency." In support of this argument they have cited the following statement from *People* v. *Washington*, 1934, 264 N. Y. 335, 338, dealing with indeterminate sentences for second offenders:

> "• • • there is, at this writing, no provision for parole of second offenders. (See Correction Law, § 223; Cons. Laws, ch. 43.) The minimum term of thirty years means nothing."

But what petitioner-appellant has claimed under the 1932 law is neither a provision for parole by the Board of Parole, nor executive clemency under the Governor's constitutional powers (Art. IV, § 4). He has claimed rights in 1932 under a *statutory compensation plan,* rights which would accrue to him *if* the Governor granted him the statutory compensation for good behavior. The provisions of the Correction Law (which is also Cons. Laws, c. 43) as they stood in 1932 (and in 1934 when *People* v. *Washington* was decided) make this distinction clear. Parole is dealt with in Article 8 of the Correction Law under the title "Parole". Section 223 which is cited by the Court as its authority for this statement, is in this Article 8 on "Parole", and it deals only with the prisoners to which this Article 8 on "Parole" shall apply. By its terms, as the Court says. this Article on parole applies only to first offenders with indeterminate sentences. Correction Law, Section 223, is set forth as Appendix B hereto, being 1 Laws of New York 1932, p. 1005, c. 457, § 223.

The rights which petitioner-appellant has claimed under the 1932 laws with regard to release after allowance of compensation for good behavior are found in Article 9 of the Correction Law, under the title "Commutation." It is submitted that in this statement from *People* v. *Washington,* the New York Court of Appeals meant just what it said—that second offenders were not eligible under Article 8 for "Parole"—but did not deny the provisions of Article 9 on "Commutation" to second offenders with indeterminate sentences.

Compensation allowances and release by the Governor for second offenders were all handled under this statutory compensation plan in Article 9 until 1936. Second offenders with definite sentences are still handled under it. The 1936 and 1948 laws have not ameliorated petitioner-appellant's situation. They have placed him and other second offenders with indeterminate sentences under a new and substantial disadvantage in seeking to serve the balance of their sentences outside the penitentiary after compensation for good

behavior has been allowed. These men must now get the approval of the Board of Parole, in addition to allowance of compensation, before they can be released.

2. Respondent-appellee has also argued that in 1932 New York Correction Law Section 230 prevented petitioner-appellant from having his 20 year minimum term diminished by allowance of the statutory compensation, because his maximum sentence was to life imprisonment. No New York cases have been cited to construe this section. The Appellate Division opinion in the case at bar did not cite it or rely on it in any way.

It is submitted that the sole purpose of this Section was to eliminate the insoluble problem of deducting monthly compensation allowances from a sentence of uncertain length like a sentence to life imprisonment. This same section 230 also provided that compensation should be deducted from the minimum term of an indeterminate sentence, and in the case at bar the minimum term was 20 years, from which monthly compensation may of course be easily deducted.

The administrative construction of Section 230 by the New York Prison Board and Board of Parole bears out this construction of the Section. For this provision of Section 230 is still on the statute books of New York, and if it would have barred allowance of compensation to petitioner-appellant in 1932, it ought to do so still. Yet the Prison Board has granted him compensation (Record, fol. 171) and the Board of Parole called him before it on March 3, 1950, to consider his eligibility for parole on the basis of the compensation allowed (fols. 175-182).

To the same effect is the statement in the "Motion to Affirm" of respondents-appellees, that after the passage of the 1936 and 1948 statutes petitioner-appellant's "minimum sentence could be reduced by the allowance of 'earned good time' and he could be admitted to parole." If this is so, clearly Section 230 could not have barred such an allowance in 1932 either, for nothing in the 1936 and 1948 statutes in

any way affected the applicability of Section 230. Section 230 is equally applicable to first and second offenders. Respondents-appellees construe the subsequent legislation as merely "permitting him to enjoy the same status as a person convicted for the first time of the crime of murder in the second degree, who had received a sentence of twenty years to life."

It is submitted that the application to petitioner-appellant of the 1936 and 1948 New York statutes, according to their clear meaning, as construed by the New York courts in this case, presents substantial questions of their invalidity as *ex post facto* laws.

Respectfully submitted,

HENRY K. CHAPMAN,
Counsel for petitioner-appellant,
291 Broadway,
New York, N. Y.

APPENDIX A

Order of the Court of Appeals denying motion for reargument and granting motion to amend remittitur, dated March 13, 1952.

A motion for reargument of or, in the alternative, to amend the remittitur in the above cause having been heretofore made upon the part of the appellant herein, and papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion for reargument be and the same hereby is denied. And it is further ORDERED that the said motion to amend the remittitur be and the same hereby is granted and the remittitur amended so as to provide as follows: A question under the Federal Constitution was presented and necessarily passed upon by this Court, viz: whether the construction which the courts of this State placed upon § 2 of Chapter 70 of the Laws of 1936, amending § 212 of the Correction Law, and of § 1 of Chapter 631 of the Laws of 1948, amending §§ 235, 236 and 241 of the Correction Law, violated the provisions of § 10 of Article 1 of the Constitution of the United States prohibiting *ex post facto* laws. This Court held that those statutes did not violate the constitutional prohibition against *ex post facto* laws.

AND the Supreme Court, Cayuga County, is hereby requested to direct its Clerk to return said remittitur to this Court for Amendment accordingly.

APPENDIX B

Correction Law § 223 as it read in 1932 and 1934:

1 Laws of New York 1932, p. 1005, c. 457, Article 8:

§ 223. *Application of Article.* The provisions of this article shall apply to every person sentenced to an indeterminate sentence on or after July first, nineteen hundred and twenty-eight, and confined in a state prison and who has never before been convicted of a crime punishable by imprisonment in a state prison. It shall not apply to any other persons. All rules of the board of parole applying to the parole of prisoners sentenced to prison before July first, nineteen hundred and twenty-eight, shall continue to have the force and effect of law.

No. 760. PIZZA *v.* LYONS, COMMISSIONER OF CORRECTIONS, ET AL.; and

No. 766. COUNTY TRANSPORTATION CO., INC. *v.* NEW YORK. Appeals from the Court of Appeals of New York. *Per Curiam:* The appeals are dismissed for the want of a substantial federal question. *Henry K. Chapman* for appellant in No. 760. *Edward R. Brumley* for appellant in No. 766. *Nathaniel L. Goldstein*, Attorney General of New York, *Wendell P. Brown*, Solicitor General, and *Herman N. Harcourt*, Assistant Attorney General, for appellees in No. 760. *Lawrence E. Walsh* for appellee in No. 766. Reported below: No. 760, 303 N. Y. 736, 103 N. E. 2d 345; No. 766, 303 N. Y. 391, 103 N. E. 2d 421.